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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 368

CENTRAL MAGAZINE SALES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-4a) is reported at 373 F.2d 633. The opinion of the district court (Pet. 5a-28a) is reported at 253 F.Supp. 485.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1967 (Pet. 4a). On May 6, 1967, the

Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 15, 1967, and the petition was filed on July 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

QUESTIONS PRESENTED

1. Whether the courts below applied the correct constitutional standards and properly found that the three magazines here sought to be imported were obscene.

2. Whether, as implemented in this case, the administrative and judicial procedures of 19 U.S.C. 1305(a) resulted in an unconstitutional delay in resolving the obscenity issue.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein

without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

On February 3, 1966, two separate shipments consisting of 3600 copies of *Review International No. 6*

and 1000 copies of *International Nudist Sun No. 16*, imported by petitioner from Denmark, arrived at the port of entry at Baltimore, Maryland. Both of these magazines consist of photographs of male nudes and unrelated accompanying text (Tr. 10-11).[1] Between Thursday, February 3 and Tuesday, February 8, these publications underwent normal customs procedures: first, a "line examiner" evaluated the magazines and found them to be probably obscene; then an "appraiser" made a similar determination; and, lastly, a body of Customs officials in Baltmore known as the Obscene Literature Committee concluded that the publications were probably obscene. On February 8, 392 copies of a magazine entitled *Exclusive*, (containing photographs of nude or nearly nude women), also imported by petitioner from Denmark, arrived at the Port of Baltimore (Tr. 10-11).

On that same day and on February 9, a meeting was held in Washington, D.C. between officials of the Bureau of Customs, the Department of Justice and other interested agencies to determine whether forfeiture proceedings should be recommended with regard to these three magazines and other publications and to determine what administrative action should be taken in light of the January 18, 1966 decision in *United States* v. *One Book Entitled "The Adventures of Father Silas", et al*, 249 F.Supp. 911 (S.D.N.Y.), holding that certain existing administrative procedures were unduly time-consuming and in conflict

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[1] "Tr." refers to the transcript of the evidentiary hearing before the district court. "R." will refer to the record of the proceedings in the court of appeals.

with the requirements of 19 U.S. 1305(a) calling for prompt resolution of the obscenity issue. One of the results of this meeting was the recommendation to the United States Attorney for the District of Maryland that he institute forfeiture proceedings as to the instant magazines (Tr. 69-78, 100, 103).[4]

On February 11, the United States Attorney for Maryland filed a libel seeking forefeiture of *Exclusive*, and on February 15, he instituted like proceedings against *Review International No. 6* and *International Nudist Sun No. 16* (R. 7, 9, 11; see also Tr. 107, 110, 146, 152). On February 19, a formal notice of seizure was received by petitioner (Tr. 201), and on February 28, answers to the libels were filed. On March 4, pursuant to the agreement of the parties, the trial judge fixed the trial date as March 9 and on that date and the following day a consolidated trial was held covering the three magazines. Expert testimony was introduced by both sides on the obscenity issue, briefs were filed and oral argument was had (See Tr. 14-15, 21, 25-26, 29-30, 213-214, 219). On March 21, while the case was *sub judice* before the district court, this Court decided *Mishkin* v. *New York*, 383 U.S. 502; *Ginzburg* v. *United States*, 383 U.S. 463; and *Memoirs* v. *Massachusetts*, 383 U.S. 413. On the following day, an application was made by petitioner's counsel to file a supplemental brief discussing these decisions. The application

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[4] It was also decided to discard the procedures found too time-consuming in the *Father Silas* case (see 19 C.F.R. § 12.40 (b-g)), and such procedures were not followed here.

was granted on March 24 and, on March 27, the supplemental brief was filed.

On April 4, the district court issued an opinion holding the magazines obscene and sustaining the Customs obscenity statute, 19 U.S.C. 1305, as constitutional both on its face and as applied in this case (Pet. 5a-28a). The court of appeals affirmed (Pet. 1a-4a).

ARGUMENT

1. In holding that the three magazines here involved were obscene, the district court and the court of appeals determined that the dominant appeal of each was to the prurient interest of the audience for whom it was designed; that each was patently offensive under national community standards; and that each was utterly without redeeming social value. The court below applied the correct constitutional standards (*e.g.*, *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420), and reached a conclusion as to obscenity having ample support in the record.

a. The finding of obscenity as to each of the magazines was correct.[*] While approximately one-half of

[*] There is no merit to petitioner's contention that the materials could not be found obscene because there was no evidence of pandering (see Pet. 16-18). In *Ginsburg* the Court, in considering whether the materials involved had any redeeming social value, did state that "in close cases evidence of pandering may be probative with respect to the nature of the material." 383 U.S. at 474. However in the present case there can be no question that the court below correctly determined that the materials involved are utterly without redeeming social value (Pet. 27a-28a) and the materials themselves

Review International No. 6 and *International Nudist Sun No. 16* contains written material, this material bears little or no relationship to the photographs and obviously is merely "filler" (see the opinion of the district court, Pet. 16a-17a). The primary contents of each magazine are untouched outdoor photographs of nude males not engaged in usual outdoor activities, but posed in standing or sitting positions, in couples or singly, with principal focus on the genital area. Based on these photographs, and the other evidence introduced at trial there was substantial foundation for the rulings that these two magazines appealed to the prurient interests of practicing homosexuals,[4] that they were patently offensive,[5] and that they were utterly without redeeming social value.

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clearly indicate that they are designed to appeal to the prurient interests of the groups for whom they are intended. While the court below did indicate that *Review International No. 6* and *International Nudist Sun No. 16* were probably "borderline material" under the patently offensive test, evidence of pandering would not appear to be relevant on that issue.

[4] The only dispute in the expert testimony in this regard was whether the appeal was of any wider range (Tr. 14-15, 21, 25-26, 213-214, 219); see opinion of the court of appeals Pet. 8a).

[5] On this issue the district court gave close consideration to the various exhibits of other allegedly comparable magazines introduced by petitioner—including those found not to be obscene in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 and *One, Inc. v. Olesen*, 355 U.S. 371. With particular reference to these exhibits, the district court found that the publications involved here "are more offensive" (Pet. 23a; see also 20a-27a).

b. The magazine *Exclusive* consists almost entirely of photographs of nude or nearly nude women.* The findings of obscenity were amply supported by the nature of these photographs—which were accurately described by the court of appeals as follows (Pet. 3a-4a):

> *Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: the model, clad only in a framing garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.

2. There was no inordinate delay in the administrative and judicial proceedings in this case. Within 12 days (eight working days) of the entry of the first of these magazines into the country, the libels were filed in the district court. Some of the time expended in the administrative process, with regard to

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*There is a short paragraph of written material on the title page declaring that the magazine is designed for "serious artists" having difficulty finding models, with the advice that the photographs be used as a "substitute". As the district judge pointed out the "material belies the protestation" which "is plainly a subterfuge" (Pet. 18a, 27a).

the two male nudity magazines, related to initial detention procedures which would normally affect all imported goods. And the two-day administrative conference (February 8-9) can hardly be termed unduly time-consuming since its effect—felt in this case—was the abolition of the slower administrative procedures which had earlier prevailed.

The judicial proceedings were conducted expeditiously. Thus, the delay from February 19, when petitioner was notified of the institution of the forfeiture, until February 28, is attributable to petitioner's need to obtain counsel and file answers to the libel. Trial was had nine days after receipt of the answer. Nor can the trial judge be faulted for not having decided the case in the ten days between the end of the trial and this Court's obscenity decisions of March 21, 1965. During this ten-day period, the trial judge had to weigh somewhat conflicting expert testimony; to compare numerous exhibits with the material in issue; and to decide the question (not raised here) as to the constitutionality on its face of the Customs statute, 19 U.S.C. 1305. Considering further, as the district court noted (Pet. 13a), that none of the magazines here involved would become obsolete or unsaleable upon appearance of the following issue, the court's desire for reflection was surely not unreasonable. Of course, as petitioner's counsel recognized in requesting leave to file an additional brief, additional evaluation became necessary following this court's decisions in *Mishkin*, *Ginzburg*, and *Memoirs*. An examination of the thorough opinion of the district court fully supports the judgment of

the court of appeals that "[e]arlier adjudication accompanied by an enlightening opinion could not reasonably have been expected" (Pet. 2a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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